

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF)	
QWEST CORPORATION'S MOTION TO)	CASE NO. USW-T-00-3
REOPEN THE SECTION 271 CASE.)	
)	
)	ORDER NO. 29137
)	

Section 271 of the Communications Act of 1934, as amended in 1996, establishes the means for a Bell Operating Company, which includes Qwest Communications International, Inc. (Qwest), to obtain authorization from the Federal Communications Commission (FCC) to begin providing in-region interLATA and interstate telecommunications services. 47 U.S.C. § 271. The role of the states and their utility regulatory commissions in the application process is limited. The FCC, in making its determination on a Section 271 application, is merely required to “consult with the state commission of any state that is the subject of the application in order to verify the compliance of the Bell Operating Company with the requirements of [Section 271].” 47 U.S.C. § 271(d)(2)(B). In order to provide a meaningful consultation to the FCC, the Commission participated in a lengthy multi-state proceeding to obtain information on Qwest’s compliance with the statute’s requirements. The case in Idaho commenced in February 2000 when Qwest filed a Notice of Intention to File a Section 271 Application and a Motion for Alternative Procedure to Manage the Section 271 Process. The Commission issued a final decision in that case on June 10, 2002.

Qwest initially filed its Section 271 application with the FCC on June 13, 2002, and on July 3, 2002, the Commission provided a written consultation to the FCC. Qwest withdrew its application on September 10, 2002, prior to a decision from the FCC.

After Qwest withdrew its initial application, two separate motions to reopen the proceedings before the Idaho Commission were filed. Joseph B. McNeal doing business as PageData (PageData) filed a motion to reopen on September 17, 2002, “based on discrimination of local Idaho carriers.” AT&T Communications of the Mountain States, Inc. (AT&T) filed its motion to reopen and supplement the record on September 19, 2002. Noting that Qwest withdrew its FCC application due to accounting issues and Qwest’s Section 272 affiliate, AT&T

asked the Commission to reopen the proceeding to “require Qwest Corporation (Qwest) to supplement the record with sufficient evidence to demonstrate that Qwest and its new Section 272 affiliate are in compliance with Section 272 of the Telecommunications Act of 1996 (Act).” AT&T Motion, p. 1 (footnote omitted).

Qwest filed a new Section 271 application with the FCC on September 30, 2002, which issued a notice of the application the same day. *See* Public Notice, WC Docket No. 02-0314, DA 02-2438, September 30, 2002. The FCC established October 15, 2002 as the date for state commissions to provide their written consultations. The Commission filed its written comments on the date due, adopting by reference the written consultation it filed with the FCC in Qwest’s initial application.

PageData’s Motion to Reopen

In its motion, PageData asserts that “Qwest has discriminated against PageData for over four years by not filling requests for additional interconnection capacity including a continuing, four year old request for ten T-1s in PageData’s Boise location.” PageData further asserts that Qwest failed to provide the same terms and conditions to PageData as it did to Western Wireless and New Vector, a Qwest affiliate, in interconnection agreements with those companies. PageData contends Qwest’s discriminatory action toward PageData results from Qwest’s failure “to recognize PageData as a full-fledged CMRS carrier equivalent to its subsidiary, U S WEST’s New Vector, and continues to pigeonhole PageData as a Type 1 only paging carrier.” PageData by its motion “seeks an order from the Idaho PUC to reopen Qwest’s Section 271 proceeding to consider new recent evidence of Qwest’s discriminatory practices.”

Qwest filed a response to PageData’s motion on October 3, 2002. Qwest argued PageData’s motion to reopen must be denied on several grounds, the first of which is untimeliness. Noting that PageData never intervened in the Section 271 case, Qwest argues its late motion is “fatally flawed” because it “constitutes the hopelessly belated intervention of a party that could have participated in this docket when it was open and when the issues it now advances were being explored.” Qwest also contends the allegations made by PageData are not properly part of a Section 271 review, and that if any matters of fact remain in dispute in the ongoing litigation between Qwest and PageData, “those disputes must be addressed outside the now completed 271 review by this Commission.”

PageData filed a response to Qwest's brief on October 9, 2002. PageData provided more details on its arguments, and includes information of an investigation underway by the Minnesota Department of Commerce regarding "secret" agreements between Qwest and Eschelon and McLeod Communications. Referencing a preliminary finding in the Minnesota case that Eschelon "did not fully participate in Qwest's [Minnesota] proceeding" because of its unfiled agreement with Qwest, PageData argues "that Eschelon, and likely others, did not submit accurate information in Qwest's Section 271 proceeding in Idaho." Regarding its claims against Qwest, PageData stated it "will leave it to the Idaho Commission's discretion to hear PageData's complaint under Qwest's 271 proceedings or to hold a separate proceeding to hear PageData's complaint."

AT&T's Motion to Reopen

AT&T in its motion notes that the FCC may not approve a Section 271 application unless it finds interLATA services, once authorized, will be provided by the Bell Operating Company consistent with the requirements of Section 272. That section requires the Bell Operating Company to provide such services only through a separate affiliate, and to satisfy FCC designated accounting standards in transactions between the two entities. 47 U.S.C. § 272(a), (b) and (c).

Qwest withdrew its initial application at the FCC because accounting irregularities raised questions regarding Qwest's ability to comply with the accounting requirements of Section 272. In the letter to the FCC withdrawing its application, Qwest recognized that questions were raised by FCC Staff "regarding the issue of whether Qwest Communications Corporation (QCC), the designated Section 272 affiliate, can be said to meet the requirements of Section 272, given pending restatement of its financial statements for past periods." With the issues that arose regarding QCC, Qwest intends to establish a new Section 272 affiliate, and AT&T contends "a fresh commission evaluation and recommendation on Qwest's new separate subsidiary is imperative." AT&T asked the Commission to reopen the record on Qwest's compliance with Section 272.

On September 20, 2002, Qwest filed a brief in opposition to AT&T's motion to reopen and supplement the record. Qwest points out that the telecommunications act requires the FCC to consult with state commissions "in order to verify the compliance of the Bell Operating Company with the requirements of subsection (c)." 47 U.S.C. § 271(d)(2)(B). The requirements

of subsection (c) relate to local competition issues (compliance with the 14 item competitive checklist and the Track A/B requirements), but subsection (c) does not include compliance with Section 272 as a subject for FCC consultation with the states. Qwest notes that it is obligated to prove at the FCC that once Section 271 approval is granted, the books, records and accounts of Qwest's long-distance affiliate will comply with FCC rules relating to generally accepted accounting principles. Thus, although compliance with Section 272 was part of the review already undertaken by the Commission on Section 271, Qwest argues "it was never required to do so, and it is neither necessary nor required to repeat that exercise at AT&T's behest now."

On September 30, 2002, Qwest filed "supplemental authority" on the points raised by AT&T's motion to reopen, consisting of a copy of an order issued by the Washington Utilities and Transportation Commission denying a similar AT&T motion filed in that state. The Washington Commission concluded that "[n]either the Act nor the FCC requires this Commission to reopen the proceeding, and doing so is not in the interest of judicial economy."

AT&T filed reply comments on September 25, 2002. AT&T contends the Commission previously reviewed Qwest's compliance with Section 272 and that significant and legitimate issues were raised in that review. AT&T argues "[t]here is no assurance that Qwest will timely implement the required structural, transactional and nondiscrimination safeguards for its relationship with its new section 272 affiliate."

DISCUSSION

The Commission has determined to deny both motions to reopen. First, regarding PageData's motion, it is clear from other Commission Orders that PageData was aware of Qwest's secret agreements and their potential controversy in sufficient time to bring its arguments to the Section 271 proceeding. The Commission on July 17, 2002 issued Order No. 29064 in Case No. USW-T-99-24, a case in which PageData sought recovery of alleged overcharges by Qwest. Order No. 29064 is the final Order in the second phase of the case that commenced in September 1999. One of the claims addressed in Order No. 29064 is that the Commission's hearing officer "committed error in failing to compel Qwest to provide certain agreements to the Pagers," allegedly "secret interconnection agreements between Qwest and other telecommunication carriers that have recently been discovered." Order No. 29064 p. 8. In discussing the claim, the Commission noted that other "state commissions and the FCC have initiated proceedings to determine whether these agreements should have been publicly disclosed

and submitted to the appropriate State commission for review.” Order No. 29064 p. 8. The Commission specifically noted PageData’s contention that the Minnesota Commission had determined the secret agreements were interconnection agreements or amendments that should have been filed with that state commission. The Commission also was aware of and mentioned Qwest’s petition filed with the FCC on April 23, 2002, seeking a declaratory ruling on whether the agreements “should have been filed with and approved by the appropriate public utilities commission.” Order No. 29064 p. 8. PageData filed initial and reply comments in the FCC docket. FCC Memorandum Opinion and Order, WC Docket No. 02-89, released October 4, 2002, footnote 2.

There can be little doubt that PageData was aware of Qwest’s unfiled agreements while the Section 271 proceeding was open and underway. In fact, PageData asserts in its reply brief that “the pagers’ Idaho proceeding was in part the catalyst for the Minnesota and Iowa investigation into Qwest’s non-filing of interconnection agreements.” PageData’s Reply to Qwest’s Answer p. 4. It would have been a simple process for PageData to step into the Section 271 proceeding and present its arguments regarding the possible effect of the secret agreements on Qwest’s compliance with the Section 271 requirements. PageData does not provide an adequate explanation for failing to participate in the Section 271 proceeding while it was pending before the Commission.

Second, the relief PageData would obtain by a reopened Section 271 proceeding is available to it simply by filing its information with the FCC, something PageData apparently has already accomplished. The Commission’s role in the FCC’s determination of Qwest’s request for interLATA service authority is limited—the Commission received evidence for a record that was forwarded, along with a written consultation, to the FCC. If the Commission were to approve PageData’s motion to reopen, the result would be additional evidence included in the record to provide to the FCC. By filing its information directly with the FCC, PageData has achieved the benefit it would obtain in a reopened Section 271 proceeding.

Finally, Qwest refiled its Section 271 application with the FCC on September 30, 2002, and the deadline for state commissions to provide written consultations was October 15, 2002. There simply is no time for this Commission to reopen its case and supplement the record to provide to the FCC. Issues on Qwest’s compliance with the statutory requirements can be presented directly to the FCC, and in fact, the Commission received service of the written

comments filed with the FCC by both PageData and Eschelon, raising the very arguments made by PageData in its motion to reopen. It is for the FCC to determine whether Qwest will be granted interLATA authority, as well as the weight to be given PageData's arguments in that determination.

The Commission also notes that PageData in its motion argues points that are part of an on-going dispute it has with Qwest which have been brought to the Commission in other dockets. For example, PageData argued in Case No. USW-T-99-24 that Qwest failed to fill PageData's orders for T-1 trunks, and also that Qwest failed to provide the same interconnection terms to PageData that it provided to Western Wireless. *See* Order No. 29064. A reopened Section 271 proceeding is not the proper place for PageData to argue its individual complaints against Qwest. To the extent PageData has new legitimate issues on requests it made for interconnection, the Commission may consider those in an interconnection proceeding, should PageData choose to file one. *See* 47 U.S.C. § 252(a)(2) and 252(b).

The Commission also will deny AT&T's motion to reopen. Qwest withdrew its initial application from the FCC as the result of discussions with that commission regarding accounting issues and Qwest's Section 272 affiliate. As the result, Qwest created a new Section 272 affiliate and refiled its application. AT&T seized that opportunity to argue the state commissions should reopen the Section 272 review, but it is now for the FCC to determine whether Qwest satisfies the Section 272 requirements with the changes it made at the FCC's behest. As the Washington UTC noted, neither the federal telecommunications act nor the FCC require this Commission to reopen its proceeding under these circumstances.

ORDER

IT IS HEREBY ORDERED that the motions to reopen the Section 271 record filed by PageData and AT&T are denied.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this
day of October 2002.

PAUL KJELLANDER, PRESIDENT

MARSHA H. SMITH, COMMISSIONER

DENNIS S. HANSEN, COMMISSIONER

ATTEST:

Jean D. Jewell
Commission Secretary

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